Petition

81-324

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL ALLEN FAGAN,
JOSEPH GARY FAGAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals Apply the Wrong Standard of Review in Examining the Trial Record.

2. Did the Government's Intentional Suppression of Evidence from the Grand Jury Require Dismissal of the Indictment.

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached in our Appendix (App. A).

JURISDICTION

The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT

1. PROCEEDINGS BELOW

On October 3, 1979 a Federal Grand Jury for the Central District of California returned a two count indictment charging six persons, including Joseph Gary Fagan and Michael Allen Fagan (hereinafter, "the Petitioners"), with conspiring to import cocaine into the United States and with conspiring to possess cocaine with intent to distribute it [C.R. 1, pp. 1-9].[1/] The Petitioners were arraigned on October 8, 1979 before the Honorable

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1/ "C.R." refers to the Clerk's Record on Appeal and is followed by the document number as designated on the computerized docket sheet, and further by the applicable page numbers for that particular document as per the Rules of the Ninth Circuit Court of Appeals.

Malcom M. Lucas. Judge Lucas initially set trial for Tuesday, December 4, 1979.

Subsequent to the arraignment the Petitioners either filed or joined in various pre-trial motions including, inter alia, motions:[2/]

(1) for discovery and disclosure of exculpatory information [C.R. 32, 38];

(2) for discovery and disclosure of witness statements and recorded testimony before the grand jury [C.R. 27, 29, 42];

2/ Each of the Petitioners filed a written joinder in the pre-trial motions of his co-defendants [C.R. 22, 23, 28].

(3) to suppress certain tape recordings made by the Government of telephone calls made in Panama, Guatemala, and the United States [C.R. 34];

(4) to interview unindicted co-conspirator David Michael Keller [C.R. 30];

(5) to dismiss the Indictment [C.R. 33]; and

(6) for depositions in Panama [C.R. 35].

As part of these motions Petitioners filed evidence that tended to show that David Keller had been physically abused while in Panama and that he had lied before the Grand Jury [C.R. 58]. In addition to the Peti-

tioners' motions, the Government moved the Court to order production of the Petitioners' passports, which had previously been surrendered to the custody of the Pretrial Services Agency [C.R. 40].

Thereafter, pre-trial hearings were held on November 21 and on December 3, 1979 [2R.T. 134]. On December 4, 1979 a jury was picked but not sworn [5R.T. 662-662]. Enpanelment of the jury was postponed pending resolution of Petitioners' pre-trial motions.

On December 6, 1979 the Court heard the Government's key witness, David Keller, testify concerning his physical abuse in Panama. Prior to this testimony Keller had not been available to the Court or Petitioners' counsel for questioning even though the Government had known of Keller's

mistreatment since early May [5R.T. 496; Exh. V]. And, although, since mid-November, the Petitioners had unsuccessfully sought to discover and explore the circumstances of Keller's treatment, the first time the Government disclosed the details of that treatment was on December 6. This disclosure was after the Court had denied an attempt by the Government to preclude Petitioners' inquiry into the area and after a jury had been selected [4R.T. 381-384].

Near the close of the hearings on December 6, the Court noted that:

> ". . . the defendants have been placed in a difficult position tactically and procedurally, and there is some substantial evidence at this juncture as to some physical abuse to which Mr. Keller was submitted subsequent to his arrest.

> "Now, an important factor in this case is whether or not there was sufficient cooperation in the joint venture aspect between the Government of the United States and the Government of Panama in terms of this particular episode. Mr. Rodriguez may or may not be able to shed some light on this . . .
>
> "It is the Court's thought that defense counsel should be given a reasonable opportunity to make inquiry in that regard whether by deposition or by their independant investigation, and that the specific revelations of Mr. Keller's contention as to his treatment at incarceration coming at this juncture immediately before trial, as indicated, places them in a difficult tactical and procedural position." [5R.T. 657-658]3/

Thereafter, the jury was dismissed by

3/ "R.T." refers to the Reporters Transcript on appeal and is preceeded by the applicable volume number and followed by the applicable page number.

the Court [5R.T. 666-667].

The Court continued trial in this matter until February 5, 1980 to allow the Petitioners time within which to develop further evidence concerning Petitioners' pre-trial motions generally and Mr. Keller's treatment in Panama and Guatemala specifically [5R.T. 667, 658, 661]. In so doing the Court advised each of the Petitioners that:

> ". . . If a showing of impossibility is made or frustration after due diligence is made by the defense, then it may be that the Court will order the government to make some production of the facts in this case. But I think the defense counsel are almost equally as capable of producing this evidence, using the powers of the courts, subpoena duces tecum, et cetera, as is the government . . . ." [5R.T. 661-662].

On January 12, 1980 the Peti-

tioners took the deposition of Octavio Rodriguez in Panama City [Exh. O]. In addition on December 21, and 26, 1979 the Petitioners served subpoenas on the United States Attorney General, the Secretary of State and the Director of the Central Intelligence Agency in Washington, D.C. pursuant to the provisions of Rule 17, Federal Rules of Criminal Procedure [C.R. 71; 6R.T. 708-709]. The Petitioners' subpoenas sought documents in the Government's files and records which reflected, inter alia, information concerning joint participation between the subject governments relating to narcotics investigations as well as information concerning physical abuse of American citizens in Panama. The Government's response varied. The Secretary of State for instance,

provided only a partial return while the CIA refused to provide any documents. On January 9, 1980 the Government moved to quash the Petitioners' subpoenas [C.R. 70]. On January 14, 1980 the Court heard argument on the Government's motion and on February 4, 1980 it issued its Order Quashing Subpoenas Duces Tecum [C.R. 80].

Further evidentiary hearings concerning the Petitioners' various pre-trial motions were held on February 4, 5, and 6 [6R.T. 74;, 7R.T. 828; and 8R.T. 983]. On February 6, 1980 the Court denied Petitioners' Motions to Suppress Tape Recordings and Dismiss the Indictment [8R.T. 1194]. In addition, the Court denied (1) the Petitioners' second and separate motion to dismiss the Indictment on the basis of governmental misconduct before the

Grand Jury [8R.T. 1198]; and (2) the Petitioners' Motion to Disclose Grand Jury Transcripts [8R.T. 1198].

Trial in this matter was continued until February 20, 1980 [6R.T. 756-757; 9R.T. 1214]. On February 20 the Petitioners waived their rights to a jury trial and special findings of fact [9R.T. 1219-1222]. Thereafter, a court trial was held on the basis of (1) evidence adduced during the hearings on the pre-trial motions; (2) certain stipulations of counsel; and (3) further testimony of David Keller [9R.T. 1221-1223]. The Court found the Petitioners guilty as charged [9R.T. 1319].

On March 24, 1980 the trial court sentenced co-defendant Jeffery Joseph Mailliard and Petitioner Joe Gary Fagan to the custody of the Attorney General

for terms of four years each [C.R. 111, 115]. Petitioner Michael Allen Fagan was sentenced to serve a period of two years in custody [C.R. 113]. On March 26, 1980 Petitioner Michael Allen Fagan filed his Notice of Appeal to the Ninth Circuit Court of Appeal [C.R. 114]. On March 31, 1980 Petitioner Joe Gary Fagan filed his Notice of Appeal [C.R. 117, 112].

On May 22, 1981, the Court of Appeals for the Ninth Circuit issued its Memorandum decision affirming the convictions of Petitioners and their co-defendants (See: App. A). On or about June 7, 1981, Petitioners filed their Petition for Rehearing and Suggestion for Rehearing in Banc. On July 22, 1981, the Ninth Circuit denied that petition. Petitioners now file this Petition for Certiori before the

United States Supreme Court.

2. STATEMENT OF FACTS[4/]

A. Keller's Arrest And Subsequent Dealings With The DEA

At approximately 11:00 a.m. on April 21, 1979 David Michael Keller was arrested at the airport outside Panama City by Panamanian customs officials [5R.T. 401, 402]. Keller was arrested in possession of cocaine, which was secreted in his boots [5R.T. 401, 432].

After an initial search, an official named "Carlos" instructed Keller to go to a small, side room, and there remove his coat, pants, and boots for a "secondary search" [5R.T. 422-

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4/ Petitioners' Statement of Facts is taken from the Reporter's Transcript of testimony and from those exhibits which were in evidence before the Court below.

423]. Keller stripped to his underwear [5R.T. 426-427]. Carlos, who was armed, handcuffed Keller [5R.T. 432]. Keller's glasses were removed from his eyes [5R.T. 427]. Thereafter, Carlos silenced Keller's questions by striking him on the left bicep and by telling him to "shut up" [5R.T. 424-425]. Carlos found the cocaine and told Keller he could expect to receive ten years in a Panamanian prison for his offense [5R.T. 425-426]. Keller was in the room "about half an hour" [5R.T. 432] and was very scared of Carlos' physical abuse [5R.T. 427, 428].

At approximately 11:30 a.m. the Chief of the Panamanian Customs Narcotics Section, Octavio Rodriguez, entered the room where Keller was standing handcuffed, in his underwear, and without his glasses [5R.T. 434,

436, 437; Exh. O, p. 6]. Rodriguez asked Keller if he wanted to talk with "a representative of the DEA" [5R.T. 435]. Rodriguez made a call to notify the local DEA representative [5R.T. 435; Exh. O, p. 34] and then told Keller "He'll be ready - he'll be able to talk to you in an hour or two" [5R.T. 442].

Rodriguez allowed Keller to dress and then drove Keller to the Panamanian Customs House in the downtown area of Panama City [5R.T. 438]. Keller was placed in the back seat of Rodriguez's car and was guarded there by a second Panamanian official, who was "short and squat and . . . looked like he had just gotten off a long bender" [5R.T. 437-438]. The car trip took approximately 30 to 40 minutes [5R.T. 439].

During the trip Rodriguez, who

speaks fluent English, told Keller that Keller would probably be sentenced to eight years of prison in Panama [5R.T. 440]. Rodriguez asked Keller if he had ever seen "Midnight Express" and told Keller that "It is just like that down here" [5R.T. 440] and that he would "have to be in [prison] with at least 23 to 24 persons in one cell" [Exh. O, p. 93].

When Rodriguez told Keller he had just seen the movie, Keller understood him to mean that he, Keller, would suffer the same physical abuse as was suffered by the main character in "Midnight Express" after his arrest in Turkey [5R.T. 440; 571-572].

At approximately 12:00 noon or 12:15 p.m. Keller arrived at the Customs House [5R.T. 443]. Keller was placed in a chair inside the Customs

House. He remained handcuffed with his hands behind him [5R.T. 444]. The guard who rode with Keller from the airport approached Keller and swung at him, missed his head and hit him behind the neck in the back area [5R.T. 403, 444].

Subsequently, Keller was taken into Rodriguez's office [5R.T. 445]. The office was approximately 12 feet by 12 feet in diameter and contained a desk, chair, and metal file cabinet [5R.T. 536-537; Exh. O. p. 37]. Rodriguez's wall is dotted with various plaques and certificates presented to him by various United States law enforcement agencies [Exh. OR pp. 8-12]. Rodriguez took Keller's handcuffs off, and told him to take off his shirt and shoes, get on the floor, and put his feet on the desk [5R.T. 446, 447].

Keller, still without his glasses, was lying flat on his back with the bottom of his feet exposed and his legs at a 40-degree angle [5R.T. 447].

Rodriguez then struck Keller on the bottom of his feet about twelve to fifteen times with a flat stick which was approximately one yard long [5R.T. 404, 447, 449]. Keller, who had been physically tired and emotioned drained, experienced pain as Rodriguez continued to hit him about the feet [5R.T. 445, 551-552].

As Rodriguez hit Keller, Rodriguez questioned Keller about the cocaine and elicited information concerning the circumstances of his offense [5R.T. 449, 450, 533]. Keller's physical discomfort increased and the clarity of his thoughts diminished as Rodriguez continued to hit Keller

[5R.T. 551-552]. At one point Keller's feet slipped off the desk and Rodriguez kicked him in the waist or kidney area [5R.T. 453]. Keller answered Rodriguez's questions out of fear and pain [5R.T. 454]. At one point Keller asked to see someone at the United States Embassy and Rodriguez told him, "Not until we finish talking to you, and I know somebody who will come and talk to you if you want to talk to them" [Exh. O, p. 51].

At a certain point in the questioning Rodriguez left the office for three to five minutes [5R.T. 537]. Rodriguez re-entered his office. Subsequently, and immediately after Rodriguez stopped beating Keller, Special Agent John L. McFarland of the Drug Enforcement Administration, walked into Rodriguez's office [5R.T. 450-

451]. It was approximately 1:30 p.m. [5R.T. 454]. Keller was on the floor as McFarland entered [3R.T. 158]; his shoes and glasses were off [5R.T. 455-456]. McFarland subsequently arranged for Keller to get his shoes and glasses back on [5R.T. 457, 535-536].

McFarland identified himself to Keller as a DEA agent and told Keller that he, McFarland, was there at the "graces of the Panamanian government" [5R.T. 457] and that he "had no jurisdiction there [and] that anything [Keller] said to [McFarland] would be voluntary" [5R.T. 457]. McFarland "went through the formalities" [5R.T. 457] with Keller and Keller was advised of his rights. Keller signed a statement acknowledging that he had been advised of certain rights.

While advising Keller of his rights, McFarland told Keller that if Keller "didn't feel that [he] wanted to talk to [McFarland] that there was nothing he could do for [Keller]; and he would have to leave [Keller] with the Panamanians" [5R.T. 458-459]. It was Keller's understanding that if he did not sign the DEA consent and waiver forms, he would be left with the Panamanians and would be subject to physcial abuse [5R.T. 461, 594].

After Keller signed the waiver forms McFarland questioned Keller about the facts surrounding his purchase and transportation of cocaine [5R.T. 446]. Keller explained he was to have taken the cocaine to Guatemala and then to Miami [5R.T. 466]. McFarland then asked Keller if he wanted to go to Guatemala to assist in the arrest of

others [5R.T.446].

McFarland also asked Keller to "cooperate" by telephoning his contacts in the United States. Keller acquiesced in order to ingratiate himself to the DEA and get out of Panama [5R.T. 471, 472]. At approximately 3:00 p.m. McFarland left Keller with the Panamanians [5R.T. 471] in order to make the necessary arrangements with the higher Panamanian officials and the DEA representative in Guatemala for a controlled delivery of cocaine by Keller to Guatemala [3R.T. 153-154].

After McFarland left, Rodriguez and a Panamanian agent named Blackmon took pictures of Keller and told Keller about the Panamanian prison named Coiba [5R.T. 474; Exh. O, p. 65]. Keller was told he would be sent to Coiba to serve his sentence on a jungle island "with

sharks all around it" [5R.T. 474]. As Octavio Rodriguez put it, after he told Keller about the prison, "[Keller] was willing to cooperate just not to stay in Panama in jail" [Exh. O, p.65].

At approximately 4:00 p.m. Rodriguez and Blackmon took Keller to the Saloy Hotel in Panama City and met there with Agent McFarland [5R.T. 475]. Once there McFarland set up a DEA tape recorder to record telephone conversations which McFarland subsequently had Keller make to and receive from the United States [4R.T. 324; 5R.T. 476]. One of those recordings was introduced against the Petitioners at trial [9R.T. 1316; Exhs. 14, 14-1].

McFarland told Keller to prepare a written statement of his activities [5R.T. 477]. Keller remained in Panamanian custody and spent the night

in the hotel with Rodriguez and Blackmon [5R.T. 476; Exh O. p. 74].

The next morning the Panamanians took Keller back to their Customs House to finish his written statement for the DEA]5R.T. 477]. McFarland came to the Customs House, looked over Keller's statement and discussed Keller's cooperation with him [5R.T. 477]. McFarland told Keller that the DEA was making arrangements to take Keller to Guatemala. Keller was told that he might have to come back to Panama for two or three months after his visit to Guatemala [5R.T. 478]. Keller was also told that if he cooperated "there was a real good chance" he would not be coming back to Panama [5R.T. 478]. Officer Blackmon told Keller that Keller was "lucky the DEA wanted [him]" because if they had not wanted him his

treatment by the Panamanians would be "different" [5R.T. 534-535].

Keller was taken back to the hotel to await possible calls from the United States. On the morning of April 23, 1979 he was taken by the Panamanians to the Customs House and eventually to the Pan American office to get his air tickets for his flight to Guatemala [5R.T. 479]. At the Pan American office he spoke with Special Agent Arthur Sedillo of the DEA [4R.T. 298-299]. Sedillo, who was McFarland's supervisor, thanked Keller for his cooperation [4R.T. 307]. He "warned" Keller to cooperate with the Panamanians and the Guatemalans and "to do the right thing" in Guatemala since this "venture" was the first joint effort of its kind between the Guatemalans and Panamanians [4R.T. 299-300,

307; 5R.T. 480, 481].

Subsequently, Keller was taken by two Panamanian officials to the airport and from there by plane to Guatemala [5R.T. 483]. At the Guatemala airport Keller met Special Agent Roger Knapp of the DEA. Knapp helped the Panamanians and Keller get through customs [5R.T. 483]. The Panamanians delivered a quantity of cocaine to the Guatemalans [5R.T. 484]. Keller was taken from the airport to the Fiesta Hotel. The Panamanians remained with Keller at the hotel until they returned to Panama [5R.T. 485]. Soon after Keller arrived at the hotel three Guatemalans arrived at Keller's room [5R.T. 486]. Guatemalan officials guarded Keller throughout his stay in that country [5R.T. 487, 488].

Keller spent a total of eleven

days in Guatemala at two different hotels [5R.T. 497]. During Keller's stay he saw Knapp on a regular basis [5R.T. 499, 500, 526]. Knapp installed a tape recorder on Keller's phones to record his calls to the United States [5R.T. 499]. Keller reported the substance of his various phone conversations to Knapp [5R.T. 499]. While in Guatemala, Keller made or received and recorded more than ten calls at the DEA's direction. Six of these calls were introduced into evidence against the Petitioners [9R.T. 1316].

Keller had been told to try to arrange to have someone come to Guatemala to pick up the cocaine [5R.T. 500]. Knapp told Keller to make it his "goal in life to get somebody down to Guatemala" [5R.T. 500]. Knapp also told him that the Guatemalans could put

him in jail for ten months before he would be tried [5R.T. 500], and that he might be sent back to Panama. Knapp told Keller about the conditions in Pavone Prison in Guatemala [5R.T. 502]. Keller was under the impression that if he did not convince someone to come to Guatemala, he would spend at least four years in Pavone Prison [5R.T. 523, 525, 585-589].

When Keller was unable to entice his contacts to come to Guatemala, the DEA sent Keller to Los Angeles, where he was met by Special Agent Gonzalez [5R.T. 503, 505]. Once in the United States, Keller remained under the belief that if he did not continue cooperating with the DEA he would be returned to Panama for prosecution [5R.T. 505, 510, 589]. Keller's primary consideration in making phone

calls for the DEA in Panama, Guatemala, and the United States and otherwise cooperating with them was his fear of going to a Panamanian or Guatemalan prison [5R.T. 589, 592; Exh. O, p. 65]. Keller feared extradition to Panama up to and including the very time he was testifying during these proceedings [5R.T. 506, 592]. The Court asked Keller on December 6, 1979: "Today you still have that belief . . . Do you still have that same state of mind?" Keller replied: "Yes, I do" [5R.T. 506]. Moreover, Keller believed that the physical abuse he received in Panama and his cooperation with the DEA in Panama, Guatemala, and the United States were connected [5R.T. 593].

Upon his arrival in Los Angeles, on May 5, Keller was debriefed by Agent Gonzalez [5R.T. 507-508]. Keller told

Gonzalez that he had been beaten by the Panamanians [5R.T. 496; Exh. V].

Between May 9 and May 14, 1979 Keller made and received more than six telephone calls which were recorded by and for the DEA (Exh. A). Five of these recordings were introduced into evidence against the Petitioners [9R.T. 1316].

B. The DEA's Joint Venture With The Panamanians And Guatemalans

Octavio Rodriguez, the Chief of the Panamanian Customs Narcotics Section, testified at his deposition that his office had a regular practice of working with the DEA [Exh. O, pp. 13-14, 56]. It was normal procedure for the Panamanians to notify the DEA within an hour of an United States citizen's arrest at the airport with narcotics [4R.T. 168; Exh. O, pp. 56,

64]. Moreover, it was established procedure for the Panamanians to turn United States citizens who were transshipping narcotics through Panama, like Keller, over to the DEA [4R.T. 308-309]. If the arrested individual chose to work with the DEA he was expelled to the United States [4R.T. 309]. In fact, McFarland's superior, Arthur Sedillo, had been cooperating with Octavio Rodriguez and his Panamanian colleagues for three to four years in this manner [4R.T. 321-322; 7R.T. 912-913]. At the time of Keller's arrest, Agent McFarland, who had been stationed at that time in Panama for three and one-half months [3R.T. 154], had responded to approximately five to six calls from Rodriguez concerning United States citizens who fit these categories [Exh. O, p.

64].

Octavio Rodriguez was responsible for all narcotics arrests at the Panama City airport, Tocumen; and for contacting the DEA when those arrests involved Americans [Exh. O, pp. 6, 10, 13, 56, 90 and 92]. Rodriguez, who had received extensive training and some financial assistance from various United States law enforcement agencies including the DEA since 1970 [Exh. O, pp. 8-12, 20-21], was fully aware that DEA agents had no jurisdiction in Panama [4R.T. 311] and were not generally permitted to participate in narcotics investigations in foreign countries [Exh. O, pp. 63-64]. Not only was that participation limited but, according to DEA guidelines DEA agents were and are to withdraw from any activity by foreign officials which

involves "conduct which endangers the life, limb, or health of an individual or creates reasonable apprehension of such danger" [Exh. T, p. 37]. The DEA did become involved in narcotics investigations in Panama when they were "invited" by the Panamanians [4R.T. 311].

Department of State records made available to the Court reflect that "at a minimum" there were ten cases of alleged and confirmed mistreatments of American citizens by Panamanian officials in 1979 [C.R. 76, Exh. A, p. 2]. The Petitioners were not provided the back-up documentation to these statistics so that the details of these cases could be analyzed. However, unclassified State Department telexes, which were provided to the Appellants, reflect narcotics arrests at the

Panamanian airport which involved allegations by U.S. citizens of Panamanian officials' mistreatment [Exhs. Q-2, Q-4; 7R.T. 925-930].

Both the DEA and Rodriguez considered the Keller arrest and investigation "special" [Exh. O, pp. 38-39; 4R.T. 299-300, 307; 5R.T. 480, 481]. Agent Sedillo saw the DEA's role in the investigation as a joint one with the Panamanian's:

> ". . . I told [Keller] that the -- what we were trying to do in this venture was to identify the source of supply and to identify the finances, and through his cooperation we were trying to do this, and with the cooperation of the Panamanian Government." [4R.T. 299-300].

In fact it was the DEA that primarily benefited from the Panamanian's efforts in this joint venture. As Agent Sedillo said about the effect of

DEA's analysis of the cocaine sample given him by Rodriguez, "I don't see how it would contribute to developing [their investigation] any further" [4R.T. 328]. Not only did the DEA receive a good portion of the cocaine to analyze, but they also furthered their own investigation by buying the two Panamanian officials' tickets to Guatemala [4R.T. 324]; by providing the recording equipment in Panama and Guatemala; by arranging for Keller's delivery to Guatemala, and by supervising his action in Guatemala.

C. Keller's Testimony Before the Grand Jury

On May 23, 1979 and on October 3, 1979 Keller testified before the Federal Grand Jury which returned the Indictment in the instant case [5R.T. 512; Gov. Exh. G]. Although

Keller had, upon his arrival in Los Angeles, advised the Government of the physical abuse he suffered in Panama, the Grand Jury was never advised of Keller's statements concerning his treatment in Panama.

During the May Grand Jury session the Grand Jury was told that Keller had made an agreement with Panamanian and American authorities [Exh. F, p. 46] and that he would not be prosecuted by the United States Government if he testified truthfully and cooperated [Exh. F, pp. 304]. Nothing was ever told the Grand Jury, however, about Keller's fear that he might be sent back to Panama for prosecution and imprisonment or of his fear of further physical abuse in Panama.

Keller was asked by the Assistant United States Attorney presenting the

case to the Grand Jury whether upon his return from Guatemala ". . . there had been conversations with Fagan?" [Exh. F, pp. 48-49]. Keller told the grand jury that "there [had] been at least one subsequent [conversation], probably two or three" and that all of those conversations had been recorded [Exh. F, p. 49].

During his October Grand Jury testimony Keller was questioned at some length by the presiding Assistant United States Attorney, Mark Bonner, and grand jurors concerning Keller's contact with the Petitioners [Exh. G, pp. 130-135]. One juror asked Keller:

> "You have not heard from these organizations that you was [sic] working with since the arrest?" [Exh. G, p. 134].

Keller's response was:

> "I haven't except for

> those tape recordings. I haven't really wanted to talk to them and I just -- you know, haven't gotten in touch with them. There is no reason for me to do that. In fact, I am kind of worried you know" [Exh. G, p. 134].

In truth Keller had slipped away from the DEA and had initiated telephone conversations with the Petitioners and their co-defendants [5R.T. 540-541]. Keller spoke with them on four different occasions without recording the conversations and without telling the DEA [5R.T. 540-541]. During the conversations Keller told the Petitioners about his mistreatment in Panama and the possibility of his spending ten years in a Panamanian jail [5R.T. 543-544]. Moreover, during the unrecorded telephone calls which Keller had lied about to the grand jury, Keller asked the Peti-

tioners for money and told them if he got the money he would leave [5R.T. 562]. Keller further asked the Petitioners whether they wanted Keller to "take-off" [5R.T. 563].

Keller testified that he first told the Government of these conversations on November 16, 1979, which was after the Petitioners had appraised the Court and the Government of the calls [5R.T. 558-559]. After Keller advised the Government of his actions, and during the time he was testifying for the Government concerning pre-trial motions, he spoke with Assistant United States Attorney Darrell W. MacIntyre about the possibility that perjury charges would be filed against him as the result of his grand jury testimony [5R.T. 565]. Keller testified that:

"[MacIntyre] told me he

didn't believe that I committed perjury."

ARGUMENT

I

The Circuit Court of Appeals Applied the Wrong Standard of Review in Examining the Trial Record

The primary thrust of the appeal to the Ninth Circuit in this case involved Petitioners' challenge to the trial court's denial of the motion to suppress. The motion was predicated upon the fact that an unindicted accomplice named Keller (who had been arrested by Panamanian authorities in Panama in possession of cocaine) testified at the motion to suppress, that he had agreed to cooperate with DEA officials only after being physically abused and mistreated at the hands of the Panamanians. He further testified that in his own mind, there was no distinction

between the Panamanians and DEA, and that if he did not cooperate with DEA, he would not be allowed to leave Panama. With that background, Keller "consented" to place telephone calls to the Petitioners and their co-defendants in the United States for the purpose of eliciting incriminating information from them.

The Ninth Circuit stated, at page 3, lines 10-21 (See: App. A) as follows:

> "The trial court, in denying appellants' motion to suppress, found that Keller's consent was voluntary. It found that there was 'no persuasive, objective evidence of any physical mistreatment' of Keller, and that even if such abuse occurred, 'there was no knowledge of such by the DEA agents involved, and certainly no participation and no condoning', nor any 'conscious avoidance of facts which would have led them'

> to such knowledge. These findings will be reversed only if our independent examination of the record -- viewing the evidence in the light most favorable to the government -- reveals them to be clearly erroneous. United States v. Henry, 615 F.2d 1223, 1230 (9th Cir. 1980)."

Thus, the Ninth Circuit examined the factual record developed during extensive pre-trial hearings under the so-called "clearly erroneous" standard of review. Applying that standard to the trial court's "findings", the Ninth Circuit Court followed the trial court's findings.

The problem with this approach is that the trial court did not make "brief, definite, pertinent" findings on the issues raised. See, United States v. Forness, 125 F.2d 928 (2nd Cir. 1942). Instead, as indicated in the above-quotation, the trial court

found as follows: (1) Keller was not beaten or physicaly abused; and (2) even if he was, DEA was not responsible.

It is respectfully submitted that when a trial judge makes this type of inconsistent finding on material issues, the "clearly erroneous" standard has no application. To apply it under such circumstances denies an Petitioners the right to have the appellate courts independently review the record and render the ultimate decision when the trial court, for whatever reason, intentionally or unintentionally, attempts to avoid or skirt the issue.

In the instant case, the trial court in effect refused to find, one way or the other, that Keller had been coerced into cooperating with DEA

agents. Thus, the Ninth Circuit's application of the "clearly erroneous" standard was inappropriate. It would indeed be an anomally of appellate standards of review to apply such a standard to the "either/or" findings made in this case.

There are clear exceptions to the "clearly erroneous" standard of review. The Ninth Circuit stated in Weible v. United States, 244 F.2d 158, 160-162 (9th Cir. 1957), that the "clearly erroneous" standard would not be applied to mixed questions of fact and law. That case involved a finding by the lower court that a taxpayer was not a foreign resident for a certain taxable year. Likewise, in United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973), the Sixth Circuit refused to apply the "clearly erroneous"

standard to a finding by the trial court that an IRS summons had been issued for criminal investigative purposes. The Court there stated at 460:

> "In our opinion, the finding by the District Court that the sole purpose of the issuance of the summons is for criminal prosecution, is not a finding of fact. It is either a mixed finding of fact and conclusion of law, or it is a finding of the ultimate fact in the making of which is involved legal principles. It is subject to appellate review, and the clearly erroneous rate has no application."

The Petitioners are somewhere between the rock and the hard place, in a classic Catch-22 position. The motion to suppress was predicated upon Keller's own testimony that he had been abused and that because of that fact he had agreed to cooperate. Keller was a

Government, not a defense witness. The trial court "found" Keller was not abused, but even if he had been, the court found that there was no evidence that the government had participated in such abuse. The Ninth Circuit refused to disturb this "finding" under the "clearly erroneous" standard.

The net effect of the trial court's ruling and the Ninth Circuit's application of the "clearly erroneous" standard has been to deny the Petitioners a determination on the merits of their Fourth Amendment defense to these charges. For that reason alone, this Petition for Certiori should be granted.

II

The Government's Intentional Suppression of Evidence from the Grand Jury Required Dismissal of the Indictment

When Keller returned to the United States on May 5, 1979, he advised Special Agent Gonzalez about the treatment he had received at the hands of the Panamanians [5R.T. 496]. Gonzalez made a report of this fact [Exhibit V]. On May 23, 1980, Keller testified before the Grand Jury. No mention was made of this treatment.

Prior to Keller's second Grand Jury appearance on October 3, 1979, Assistant United States Attorney Mark Bonner was advised of these beatings.

> "MR. BONNER: Yes, your Honor, there were statements made orally in the initiation of this case to me by the DEA agent, I believe, that Keller had told him he had been whacked

> on the feet. And this was back about a month before the case was indicted. And the question in my mind there was several-fold: First, whether to believe Keller, whether he was lying or not, and to conduct further investigation." [5R.T. 640].

On October 3, 1979, the case was presented to the Grand Jury for indictment. As reflected in Exhibit G, the transcript of Keller's testimony before the Grand Jury, at no time did Mr. Bonner even attempt to bring out this information.

After Keller first returned to the United States on May 5, 1979, and prior to his first Grand Jury appearance on May 23, 1979, Keller slipped away from the authorities, called the Petitioners, advised them of what had happened to him in Panama, and asked them for money [5R.T. 540-544]. When Keller testified

before the Grand Jury in May, he testified as follows: [Exhibit F. pp. 48-49].

> "Q: Did you then come home?
>
> A: The next morning on the . . . 5th of May, I proceeded to get on a Pan Am flight with the ticket I had already and flew up to L.A.
>
> Q: Had there been subsequent conversations with Fagan?
>
> A: There had been at least one subsequent, probably two or three.
>
> Q: Were those conversations recorded?
>
> A: All of those were recorded also, yes."

In October, Keller testified again before the Grand Jury that returned the instant Indictment. Again, Keller denied having any contact with the Defendants except under the control and supervision of DEA [Exhibit G. pp.

134-135].

> "A JUROR: You haven't heard from these organizations that you was [sic] working with since the arrest?
>
> THE WITNESS: I haven't except for those tape recordings I haven't really wanted to talk to them and I just -- you know, haven't gotten in touch with them. There is no reason for me to do that. In fact, I am kind of worried, you know." [Exhibit G, p. 134].

On November 2, 1979, Petitioners filed a motion for discovery, revealing for the first time that they were aware of the fact Keller had contacted them in May of that year. On November 14, 1979, Keller submitted a written declaration stating, "All of these conversations [telephone calls] were tape recorded with my knowledge and consent." [C.R. 57]. On November 16, 1979, Assistant United States

Attorney Darrell MacIntyre confronted Keller in his office and asked him whether or not he had in fact placed these unrecorded phone calls to the Defendants. Keller advised Mr. MacIntyre he had in fact called the Petitioners JOE and MICHAEL FAGAN [5R.T. 564-565].

Following this revealation, MacIntyre and Keller discussed the subject of perjury. According to Keller "[MacIntrye] told me he didn't believe that I committed perjury." Thereafter, on November 26, 1979, the Government turned over to counsel for the Petitioners Keller's Grand Jury transcripts for May and October.

Keller took the stand to testify at the hearings on the motion to suppress on December 5, 1979. After discussing the events underlying the Indictment,

Mr. MacIntryre approached the side bar, and asked by way of a motion in limine that counsel for the Petitioners not be allowed to inquire into the circumstances of Keller's arrest and his treatment at the hands of the Panamanian [4R.T. 382-383]. The Court denied this request, and Keller was examined in this area on December 6, 1979. It was thus two days after selection of the jury that the Defendants first were advised of Keller's treatment at the hands of the Panamanians.

Following the taking of the deposition in Panama and at the conclusion of the hearings on the motion to suppress on February 6, 1980, the prosecution for the first time took the position that Keller was lying about his treatment at the hands of the Panamanians

[8R.T. 1007-1009]. The Petitioners moved that the Government be required to advise the Grand Jury prior to trial that the Government believed Keller had perjured himself at these hearings. This motion was denied [8R.T. 1194-1197].

Thus it is that prior to the discharge of the indicting Grand Jury and prior to jeopardy attaching in this case, the Government intentionally suppressed from the Grand Jury the following information:

1. Prior to Indictment, Mr. Bonner was aware of Keller's claim of physical abuse. This information was not presented to the Grand Jury;

2. On November 16, 1979, Mr. MacIntyre was aware of

the potential perjury issue. Prior to furnishing defense counsel copies of these transcripts, and prior to defense counsel even being aware of the issue, Mr. MacIntyre counseled Keller, then represented by counsel, that Keller had not perjured himself before the Grand Jury. Because of this characterization, the Government refused to advise the Grand Jury of this information;

3. After Keller testified at the hearings on the motion to suppress, and while the question of the voluntariness of Keller's consent hung in the balance,

> the Government elected to characterize his testimony at the hearings as perjurious (the euphemism employed was "less than credible"). Counsel for the Defendants requested that the Grand Jury be so advised some two weeks prior to trial. The Government again refused to supply this information.

It is the position of the Petitioners that the intentional suppression of information from the Grand Jury, under the facts of this case, requires reversal and a dismissal of the Indictment. Crucial information bearing on the credibility of this key witness was not disclosed and perjurious testimony bearing on material

facts was not corrected.

In United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974), the Ninth Circuit stated:

> "We hold that the Due Process Clause of the Fifth Amendment is violated when a Defendant has to stand trial on an indictment which the Government knows is based partially on perjured testimony, when the perjured testimony is material and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the Court and opposing counsel -- and, if the perjury may be material, also the grand jury -- in order that appropriate action may be taken."

There can be no doubt but that Keller's testimony was perjurious. Keller, a college-educated young man, denied not once but twice any contract with the Petitioners except under the control and supervision of DEA. His

reasons are readily apparent: He had to continue to cooperate with DEA or, in his mind, he would be sent back to Panama. He obviously did not want to disclose the fact he had slipped away to warn the Petitioners of his forced cooperation.

Neither can it be doubted that the perjury was material. It bore on the central issue involving Keller, credibility. Had Keller advised the Grand Jury of why it was necessary to slip away and warn the Petitioners, it would have raised the entire issue of his willingness to cooperate and the threats made to him and his treatment at the hands of the Panamanians. The Grand Jury confronted with this undisclosed information, may have elected not to return this Indictment based upon the insufficiency of the other

evidence.

In 1977, the Ninth Circuit held that only in a flagrant case, and "perhaps only where knowing perjury relating to a material matter" had been presented to a grand jury should an indictment be dismissed. United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977). It is respectfully submitted that this is that flagrant case. When the Government first suppresses evidence of beatings, then counsels a witness that the witness did not commit perjury, then accuses that same witness of perjury during pre-trial hearings -- all in the spirit of apparent gamesmanship and a desire to "win" at any cost, the grand jury system has been abused.

The Ninth Circuit, two years after the Kennedy decision, decided United States v. Samango, 607 F.2d 877 (9th

Cir. 1979). In sustaining the District Court's decision to dismiss and Indictment, the Ninth Circuit focused in on the cumulative effect of the prosecutor's conduct. While acknowledging that various disfavored practices, such as re-reading transcripts instead of producing live testimony, badgering witnesses and inflammatory remards, in and of themselves might not warrant dismissal, the cumulative effect can "tip the scales" in an appropriate case. Samango, at 884.

It is respectfully submitted that the scales were tipped in this case in much the same manner they were tipped in Samango. Mr. Bonner, in presenting this case, chose not to disclose the beatings which occurred in Panama. Mr. MacIntyre, anticipating the Basurto issue, met with Keller prior to turning

over to the Defendants Keller's Grand Jury testimony, and advised Keller that the Government did not view the testimony as perjurious. And finally, to defeat the motion to suppress, the Government at the conclusion of the evidentiary hearings chose to characterize Keller's testimony as perjurious. Apparently it is still possible to have one's cake and eat it too.

All that the Petitioners asked for and sought was to require the Government to bring these facts to the attention of the Grand Jury. It would be futile to speculate what they would have done had they been properly advised of all the information which had come to the Government's attention. It it the "intregrity of the administration of justice" which is at

issue here. As observed by Judge Hufstedler in Basurto, supra, at 793:

> "An important function of our supervisory power is to guarantee that federal proseuctors act with due regard for the integrity of the administration of justice. In Mesarosh v. United States (1956) 352 U.S. 1, 77 S. Ct. 1, 1 L.Ed.2d a case involving possible perjury by a witness at trial, the Supreme Court observed: 'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the water of justice are not polluted.'" [Citation Omitted]

The failure to advise the Grand Jury in this case of all the facts, and the subsequent failure to advise them of the perjurious nature of Keller's testimony when they could easily have done so polluted the waters of this

case and denied Petitioners their right to due process of law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiori be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JEFFERY JOSEPH MAILLAIRD, Defendant-Appellant.	No. 80-1190 D.C. CR 79-806-MML
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MICHAEL ALLEN FAGAN, Defendant-Appellant.	No. 80-1191 MEMORANDUM
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSEPH GARY FAGAN, Defendant-Appellant.	No. 80-1192
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT LEE JONES, Defendant-Appellant.	No. 80-1193 FILED MAY 22, 1981 RICHARD H. DEANE CLERK, U.S. COURT OF APPEALS

Argued and Sumitted--April 6, 1981

Appeal from the United States District Court for the Central District of California The Honorable Malcolm L. Lucas, Presiding

BEFORE: FLETCHER, PREGERSON, and REINHARDT, Circuit Judges.

Each appellant in these consolidated cases was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. §§ 963 and 960(a)(1), and conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Appellants challenge these convictions. For the reasons set out below, we reject all of appellants' challenges and affirm the convictions.

I. Keller's Consent

Mailliard and the Fagans were tried by the court; Jones received a separate jury trial. At both trials, tapes and transciprts of telephone conversations between various appellants and David Keller, an unindicted co-conspirator who testified for the government, were admitted into evidence. Appellants

argue that their pre-trial motion to suppress those tapes and transcripts should have been granted because the parties to the phone conversations did not conesent to their interception, as required by 18 U.S.C. § 2511(2)(c).[1] The government's position is that Keller consented to the monitoring and recording of these conversations. Appellants contend that Keller's consent was not voluntary but was extorted by physical abuse and psychological threats.

Keller was arrested by Panamanian authorities on April 21, 1979 at the airport in Panama City after he was found to have 1000 grams of cocaine secreted in the oversized boots he was wearing. He was interrogated for approximately thirty minutes by Octavio Rodriguez, chief of the narcotics

section of Panamanian customs, and was the visited by DEA Agent John McFarland, who gave Keller a Miranda warning and questioned him after Keller signed a consent-to-interview form. During McFarland's questioning, Keller outlined appellants' cocaine-sumuggling operation, for which he said he was a courier, and agreed to place the first of the recorded phone calls. Continuing to cooperate with the DEA, Keller was later taken to Guatemala to arrange a controlled buy; when this failed, he was returned to Los Angeles. Further recorded phone conversations took place while Keller was in Guatemala and the United States.

Appellants allege that Octavio Rodriguez beat Keller during the initial interrogation and that the DEA exploited this beating by threatening

to leave Keller with the Panamanians unless he agreed to assist the DEA investigation. The alleged beating, the threats, and Keller's continuing fear that he could be extradited to Panama if he ceased cooperating render his consent to record the phone conversations not voluntary, according to appellants.

The trial court, in denying appellants' motion to suppress, found that Keller's consent was voluntary. It found that there was "no persuasive, objective evidence of any physical mistreatment" of Keller, and that even if such abuse occurred, "there was no knowledge of such by any of the DEA agents involved, and certainly no participation and no condoning," nor any "conscious avoidance of facts which would have led them" to such

knowledge. These findings will be reversed only if our independent examination of the record--viewing the evidence in the light most favorable to the government--reveals them to be clearly errouneous. United States v. Henry, 615 F.2d 1223, 1230 (9th Cir. 1980). Our examination of the record convinces us, on the contrary, that the trial court's findings were by no means clearly erroneous but were supported by substantial evidence.

During the hearing on appellants' motion to suppress, Keller testified that while questioning him Rodriguez beat him twelve to fifteen times on the soles of his feet with a stick roughly as long, and twice as thick, as a yardstick. This testimony was the only evidence of any physical abuse. No Americans were present during the

alleged beating, and Octavio Rodriguez, whose deposition was taken, denied having struck Keller. DEA Agent McFarland, who interviewed Keller immediately after the beating allegedly ocurred, saw no bruises or scars, no did Agent Sedillo, McFarland's DEA superior in Panama, who saw Keller briefly about four hours after the supposed beating. Keller himself admitted that the alleged beating produced no bruises, bleeding, or swelling, "[n]o significant problem" in walking, and no nausea or vomiting.

Keller's credibility was weakened by the fact that he waited about two weeks before mentioning the alleged beating to anyone. He said nothing about it to McFarland, who supposedly arrived just after the beating, nor to Sedillo, nor to Roger Knapp, the DEA

agent in Guatemala. Moreover, in evaluating Keller's credibility the trial court could properly consider that Keller had a motive for claiming coercion--to deflect his co-conspirators' anger by excusing his cooperation with the government as the product of duress.[2]

Since there is little evidence that Keller was beaten at all, a fortiori there is little evidence that the DEA knowingly took advantage of such an alleged beating by threatening to return Keller to Panama if he ceased cooperating.[3] Indeed, even assuming Keller was beaten, there is no evidence that the DEA had any knowledge of this until Keller mentioned it when he returned to the United States some two weeks after the alleged event. Keller told the agents in Panama and Guatemala

nothing about any beating and bore no signs of mistreatment. Agents McFarland and Sedillo both testified that they knew of no comparable instances of Panamanian abuse of American citizens there.

Keller himself testified that he regarded only two DEA actions as attempts to coerce him into cooperation. One was McFarland's statement, when he arrived at the Panamanian customs office to interview Keller after the alleged beating, that he was present solely "at the graces of the Panamanian authorities" and would have to leave Keller with the Panamanian if Keller did not wish to talk with him. The other occurred in Guatemala, when, according to Keller, DEA agent Knapp told him "it was my goal in life to get somebody down to Guatemala" and that

otherwise Keller could go to jail in Guatemala.

In view of the evidence, already discussed, that McFarland knew nothing of any beating by the Panamanians, we decline to view his statement as a veiled threat rather than as a simple statement of fact. As for Knapp, he denied making the "goal in life" statment, and on appeal this evidentiary conflict must be resolved in favor of the government. Knapp did acknowledge passing on to Keller the Guatemalans' statement that they would consider bringing (unspecified) charges against Keller if no co-conspirator arrived from the United States, but we do not view this statement as sufficient to vitiate Keller's consent. Certainly it has no effect on the voluntary nature of the calls that had

already been made or those recorded after Keller returned to the United States, and it is once again difficult to decide whether Knapp was deliberately threatening Keller or legitimately giving him accurate information.

It is true that part of Keller's motivation in cooperating with the DEA was his fear of exposure to generally inhumane conditions, including physical abuse, if he were jailed in Panama.[4] But persons caught in criminal activity in the United States who agree to cooperate with the police or the prosecution normally do so in the hope of minimizing or avoiding imprisonment in this country, which can often involve harsh conditions. Cooperation motivated by a co-conspirator's desire to avoid or reduce possible imprison-

ment is not ipso facto involuntary. United States v. Brandon, 633 F.2d 773 (9th Cir. 1980); United States v. Ryan, 548 F.2d 782 (9th Cir.), cert. denied, 429 U.S. 939 (sum nom. Zeldin v. United States) and 430 U.S.)65 (1977).

II. Other Contentions Raised by Mailliard and the Fagans

A. Alleged DEA misconduct. Appellants cite a number of statutes and regulations and argue that they were violated by the actions of the DEA agents involved with Keller, so that the transcripts and tapes of Keller's phone conversations should be suppressed. These arguments are without merit.

The Mansfield Amendment, 22 U.S.C. § 2291(c)(1), was not violated because the DEA took no part in "direct police arrest action" against Keller. The

State Department consular handbook that appellants cite does not, on its face, apply to DEA agents, and appellants offer no convincing argument to the contrary. No violation of Panamanian or Guatemalan law has been established, nor do appellants state any reason for believing that the DEA violated Executive Order No. 12036. Finally, as to the DEA guideline concerning prior Justice Department authorization for "consensual electronic surveillance," appellants never responded to the evidence indicating that such phrase does not include monitoring telephone calls. Even if prior approval was required for the recordings, failure to obtain it would not bring the exclusionary rule into play. United States v. Caceres, 440 U.S. 741 (1979).

B. Alleged prosecutorial miscon-

duct. Having reviewed the record, we are persuaded that none of the alleged acts of prosecutorial misconduct warrant either reversing appellants' convictions or dismissing the indictment.

For example, appellants contend that the government's failure to inform the grand jury of Keller's alleged perjury mandates dismissing the indictments, under the rule of United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). Basurto held that due process is violated by "an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached." 497 F.2d at 785 (emphasis added). In the instant case Keller's challenged statements concerned a matter com-

pletely peripheral to the basis for the indictment. They were not material.

Moreover, appellants argue that they sought to interview Keller but that the prosecution advised Keller not to cooperate. The portion of Keller's testimony which they cite, however, does not support this contention. Indeed, defense counsel explicitly withdrew their pretrial motion to dismisss for inability to interview Keller "in light of the fact that Mr. Keler has met with counsel for the defense on various occasions." RT 893-94.

C. Alleged improper limit on discovery. On February 4, 1980, the trial court filed an order quashing subpoenas duces tecum which appellants had served on the United States Attorney, the Attorney General, the

Secretary of State, and the Director of Central Intelligence. Challenging this action, appellants argue that the convictions should be reversed and the case remanded to allow further discovery concerning the existence of a "joint venture" between the DEA and the Panamanian and Guatemalan narcotics authorities.

Appellants, however, have presented little credible evidence that Keller was ever beaten, as discussed in section IA supra. If, as the district court found, no physical abuse occurred, then the degree to cooperation between the DEA and the Latin Americans is irrelevant: a "joint venture" is significant only insofar as it would permit imputation of Panamanian (or Guatemalan) misconduct to the DEA. Accordingly, we reject appellants'

argument.

III. Contentions Raised by Jones

A. Standing to contest Keller's consent. Appellant Jones joined in his co-defendants' pretrial motion to suppress the tapes of Keller's phone conversations and unsuccessfully renewed his objection at trial. The government contends, and the trial court ruled, that Jones had not standing to attack as involuntary Keller's consent to record the conversations. That ruling is correct.

The controlling statute, 18 U.S.C. §2518(10)(a), permits "[a]ny aggrieved person" to move to suppress recorded phone conversations. An "aggrieved person" is defined as one "who was a party to any intercepted wire or oral communication or . . . against whom the

interception was directed." 18 U.S.C. §2510(11). The legislative history reveals that this definition was intended to reflect the law on Fourth Amendment standing that existed when the statute was enacted.[5] S. Rep. No. 1097-80. Under that law, a defendant was not permitted to assert the Fourth Amendment rights of another. Alderman v. United States, 394 U.S. 165 (1969). Accordingly, this circuit has held that "a defendant may move to suppress the fruits of a wire-tap only . . . he was a participant in an intercepted conversation, or if such conversation occured on his premises." United States v. King, 478 F.2d 494, 506 (9th Cir.), cert. denied, 414 U.S. 846 (sub nom. Light v. United States) (1973) and 417 U.S. 920 (1974); accord, United States v. Jabara, 618 F.2d 1319,

1326 (9th Cir. 1980). Since Jones was neither a party to one of the intercepted conversations nor a person on whose premises any of these conversations occurred, he has no standing to challenge the admission against him of the tapes and transcripts of the conversations.

B. Restrictions on Cross-Examination. Jones contends that the trial court's restrictions on his cross-examination of Keller violated his Sixth Amendment confrontation right and foreclosed an effective defense. We recognize the need for wide latitue in cross-examination where a key prosecution witness is an accomplice of the accused. Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980). Nevertheless, we owe deference to the trial

court's "broad discretion concerning the proper extent of cross-examination." Chipman v. Mercer, 628 F.2d 528, 531 (9th Cir. 1980). Here, that discretion was not abused. The permitted cross-examination gave the jury "sufficient evidence to appraise the biases and motivations of the witness" and the trial court thus did not abuse its discretion. United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979).

C. Sufficiency of the evidence. Jones argues that the evidence was insufficient to support his conviction on either count. He relies chiefly on this circuit's rule that "the uncorroborated testimony of an accomplice is sufficient evidence upon which to base a conviction if the testimony 'is not

incredible or unsubstantial on its face.'" United States v. Sigal, 572 F.2d 1320, 1324 (9th Cir. 1978). Jones contends that Keller's testimony was both uncorroborated and incredible. He is wrong on both points.

First, Keller's testimony was corroborated by other witnesses, by the recorded phone calls, and by documentary evidence such as passport entries, airline tickets, and hotel and motel registrations. Second, Keller's testimony was not incredible. For example, contrary to Jones's assertion, it is not incredible that a man with two college degrees like Keller knew less than Jones, a truck driver, about testing the purity of cocaine. Keller's degrees were in economics and environmental studies.

Jones also asserts that the govern-

ment's evidence establishes at most that he participated in a cocaine purchase in Peru. This understates the force of the evidence. We must view that evidence in the light most favorable to the government. United States v. Grayson, 597 F.2d 1225, 1229 (9th Cir.), cert. denied, 100 S. Ct. 153 (sub nom. MacGregor v. United States) and 100 S. Ct. 157 (1979). So viewed, Keller's testimony and the corroborating evidence support the conclusion that Jones was an active member of a cocaine-smuggling operation headed by co-defendant Mailliard. Jones did not merely associate with an accomplice, as he contends in his brief; he actually brought the money for the drug purchase with him, contacted the connection, bought the cocaine, and showed Keller how to conceal it. There was evidence

that Jones had engaged in such activities before; this evidence, together with the large quantity of cocaine involved, permits the inference that Jones knew his actions were linked to a conspiracy to distribute cocaine in the United States. We conclude that the evidence was sufficient to convict Jones on both counts.

CONCLUSION

The judgment of the district court is **AFFIRMED.**

FOOTNOTES

1. 18 U.S.C. § 2511(2)(c) reads as follows:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

2. There is evidence, both in Keller's testimony and in the recorded phone calls, that at least some of the appellants let it be known that anyone who betrayed them would face reprisals.

3. Furthermore, Keller himself said that he had been hurt worse in rugby games than by the alleged beating, and he had agreed with the Panamanians to be interviewed by

the DEA while still at the airport, before the beating supposedly took place. This casts doubt on the role that fear of further beatings played in his cooperation.

4. Keller testified that when arrested he was afraid of languishing for months in a Panamanian jail, subject to physical abuse, before trial, only to be sentenced to even longer, equally hazardous imprisonment. Appellant Mailliard had warned him that the Panamanians would use cattle prods on him if he were caught. Keller also said that fear of going to a Panamanian prison was his primary consideration in assisting the DEA not only in Panama but in Guatemala and the United States as well.

5. 18 U.S.C. §§ 2510, 2518 were

enacted as parts of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211.

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